

that Rule bars evidence of a person's character traits for the purpose of proving action in conformity therewith, except in certain limited situations that are irrelevant here. Subsection (b) of that Rule also bars evidence of other wrongs or acts to prove character in order to show conforming action. The second part of Rule 404(b), however, specifically allows evidence of past acts to demonstrate motive or intent. It is precisely to demonstrate a motive or intent to abuse FCC processes that EZ has

³⁴(...continued)

(a) Character evidence generally. -- Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

- (1) Character of accused. -- Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
- (2) Character of Victim -- Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
- (3) Character of witness -- Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. -- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

proffered the information about other applicants represented by ACGI's counsel.

III. Conclusion

ACGI's attempt to minimize EZ's serious allegations about the bona fides of ACGI's application must fail. ACGI's totally improper motivation coupled with its application's cumulative engineering deficiencies compel dismissal of its renewal challenge. Without such a result, the Commission's attempt at renewal reform has been for naught. Broadcasters, like EZ, who have served their communities well and committed no violations of the Commission's rules or policies, will continue to be "held up" by applicants who present, by contrast, evidence of substantial association with past and continuing abusive practices.

Respectfully submitted,

EZ COMMUNICATIONS, INC.

By 

Rainer K. Kraus
M. Anne Swanson

of

KOTEEN & NAFTALIN
Suite 1000
1150 Connecticut Avenue, N. W.
Washington, D. C. 20036
(202) 467-5700

January 17, 1992

CARL T. JONES
CORPORATION

STATEMENT OF HERMAN E. HURST, JR.
IN SUPPORT OF A
REPLY TO AN OPPOSITION TO A
PETITION TO DISMISS OR DENY
AN APPLICATION FOR A NEW FM BROADCAST STATION
AT PITTSBURGH, PENNSYLVANIA
FCC FILE NO. BPH-910628MC

Prepared For: EZ Communications, Inc.

I am a Radio Engineer, an employee of the firm of Carl T. Jones Corporation, with offices located in Springfield, Virginia.

My education and experience are a matter of record with the Federal Communications Commission.

This office has been authorized by EZ Communications, Inc. ("EZ"), licensee of WBZZ(FM), Pittsburgh, Pennsylvania, to prepare this statement and associated exhibits in support of a Reply to Opposition to Petition to Dismiss or Deny ("Opposition") filed by Allegheny Communications Group, Inc. ("ACGI"). ACGI's Opposition was in response to EZ's Petition to Dismiss or Deny an application (FCC File No. BPH-910628MC) for a new FM broadcast station at Pittsburgh, Pennsylvania, filed by ACGI which is mutually exclusive with the WBZZ(FM) Renewal of License Application.

In its original application, ACGI proposed to operate on 93.7 MHz (Channel 229) as a Class B allotment with a maximum effective radiated power of 43.5 kW using a directional transmitting antenna with an antenna height of 157.5 meters above average

STATEMENT OF HERMAN E. HURST, JR.
REPLY TO OPPOSITION TO
PETITION TO DISMISS OR DENY
PAGE 2

terrain. On August 30, 1991, ACGI amended its application by modifying the directional antenna pattern with the intent to "eliminate any potential conflict between the ACGI application and the proposal pending in MM Docket No. 87-433 to allocate Channel 228A to Barnesboro, Pennsylvania."¹

VIOLATION OF THE COMMISSION'S SHORT-SPACING STANDARDS

ACGI proposes to locate its transmitting antenna at an AT&T radio/microwave communications site which does not meet the spacing requirements of Section 73.207 of the Rules and Regulations with regard to WQIO(FM), Mt. Vernon, Ohio, on Channel 229B and WQYX(FM), Clearfield, Pennsylvania, on Channel 230B1. With respect to WQIO(FM), ACGI has not requested a waiver of Section 73.207 in either its original application or amended application; rather it simply assumes entitlement to the provisions of 73.213 since WBZZ(FM) and WQIO(FM) maintain a "grandfathered short-spaced" relationship. The WQYX short-spacing was addressed under the provisions of Section 73.215.

ACGI, in its Opposition, has set forth a number of reasons why the ACGI proposal is entitled to the provisions of Section 73.213 with respect to WQIO(FM). ACGI's

¹See Engineering Statement covering amendment to Application for Construction Permit for Allegheny Communications Group, Inc., Page 1.

STATEMENT OF HERMAN E. HURST, JR.
REPLY TO OPPOSITION TO
PETITION TO DISMISS OR DENY
PAGE 3

arguments, valid or not, are simply attempts to justify a waiver of Section 73.207 which was never requested. Absent a request for waiver of Section 73.207 with respect to the Allegheny short-spacing to WQIO(FM), the ACGI application violates the Commission's basic allocation requirements.

With the adoption of Section 73.215 of the FCC Rules, the Commission stated, "that future approval of new or modified facilities might depend on greater flexibility in the selection of transmitter sites, some of which might be unable to meet the current distance separation requirements set forth in the Rules."² Section 73.215 was expressly created to enable use of sites not conforming with the Commission's spacing requirements.

Moreover, ACGI has failed to recognize that a permissible site area exists in which the proposed transmitter site would have the ability to be fully-compliant with the FCC Rules and Regulations pertaining to contour protection. The Permissible Site Area is depicted on Exhibit 1, attached. With a reduction in its maximum ERP and a properly designed directional antenna, ACGI had the ability to protect WQIO, the potential first-adjacent Barnesboro facility, and WQIX pursuant to Section 73.215. Attached as Exhibit 2 is a tabulation of the directional antenna pattern (in relative field, based on a maximum

²See Report and Order, MM Docket 87-121, Amendment of Part 73 of the

STATEMENT OF HERMAN E. HURST, JR.
REPLY TO OPPOSITION TO
PETITION TO DISMISS OR DENY
PAGE 4

ERP of 30 kilowatts at an antenna Height Above Average Terrain of 100 meters) required to achieve the protection requirements stated above from a hypothetical site within the fully-compliant permissible site area.³

As stated in EZ's Petition to Dismiss or Deny, it is herein reemphasized that under the limited circumstances of a contested license renewal proceeding, if the incumbent's licensed transmitter site is short-spaced to another FM facility, the mutually exclusive applicant must request processing under Section 73.215. In the event Section 73.215 of the FCC Rules is technically impossible to comply with, the applicant must request, and compellingly justify, a waiver of the Commission's spacing requirements of Section 73.207. Only in the event that the appropriate waiver showing is made should processing under Section 73.213 be allowed. ACGI has neither requested processing under Section 73.215 with regard to its short-spacing with WQIO, nor requested and made a showing for a waiver of Section 73.207.

Accordingly, ACGI's application, as originally submitted and as amended, fails to meet the basic allocation requirements set forth in the FCC Rules and Regulations.

³ A waiver of the Commission's 8.0 kilometer temporary restriction on short-spacings under Section 73.215 would be required. With such a waiver request, the application would be fully-compliant with all rules.

STATEMENT OF HERMAN E. HURST, JR.
REPLY TO OPPOSITION TO
PETITION TO DISMISS OR DENY
PAGE 5

VIOLATIONS OF SECTION 73.316 OF THE FCC RULES

ACGI proposes to utilize an ERI DA-1005-3-bay directional antenna to protect short-spaced stations WQIO(FM), Mt. Vernon, Ohio, (under Section 73.213) and WQYX(FM), Clearfield, Pennsylvania, (under Section 73.215). In its August, 1991, amendment, ACGI introduced its intention to protect a first-adjacent Class A allotment proposed for Barnesboro, Pennsylvania, in Docket 87-433, by further suppressing its antenna radiation towards Barnesboro allegedly in accordance with Section 73.215. As a result, the ACGI proposal is subject to the provisions of Section 73.316 of the FCC Rules regarding directional antennas.

Section 73.316(b)(2) states that, "directional antennas used to protect short-spaced stations pursuant to Section 73.213 or Section 73.215 of the FCC Rules, that have a radiation pattern which varies more than 2 dB per 10 degrees of azimuth, will not be authorized." As stated in EZ's Petition to Dismiss or Deny, the radiation pattern proposed by ACGI in its original application exceeds this maximum rate of attenuation over the arcs from 50° True to 60° True and 90° to 100° True. The radiation pattern introduced in the

STATEMENT OF HERMAN E. HURST, JR.
REPLY TO OPPOSITION TO
PETITION TO DISMISS OR DENY
PAGE 6

STATEMENT OF HERMAN E. HURST, JR.
REPLY TO OPPOSITION TO
PETITION TO DISMISS OR DENY
PAGE 7

<u>Azimuth</u>	<u>Original Application Table II Relative Field</u>	<u>Opposition to EZ Petition to Deny Relative Field</u>
50 deg.	0.718	0.71734
60 deg.	0.569	0.56984
90 deg.	0.671	0.67726
100 deg.	0.852	0.85262

Notwithstanding the above noted inconsistencies and the rounding argument, ACGI, in its Opposition, has itself demonstrated that its original proposal is in violation of Section 73.316(b)(2) of the FCC Rules. By simply stating that the originally proposed antenna pattern exceeds the maximum rate of attenuation specified in Section 73.316(b)(2) of the FCC Rules, regardless of the amount by which it exceeds the 2 dB per 10 degree limit, renders the pattern non-compliant. The 2 dB per ten degree rule sets forth an absolute maximum allowable rate of attenuation. Contrary to the ACGI Opposition, the rate of attenuation is not rounded to the nearest whole number. Section 73.316(b)(2) clearly states that "a radiation pattern which varies more than 2 dB per 10 degrees of azimuth will not be authorized."

As stated earlier, ACGI's amended application is also defective in this respect. The following relative fields were taken directly from Table I of ACGI's amended application:

STATEMENT OF HERMAN E. HURST, JR.
REPLY TO OPPOSITION TO
PETITION TO DISMISS OR DENY
PAGE 8

<u>Azimuth</u>	<u>Relative Field</u>	<u>ERP(kW)</u>	<u>ERP(dBk)</u>
10 deg.	0.914	36.3397	15.6038
20 deg.	0.726	22.9278	13.6036

Rate of Attenuation 2.0002

<u>Azimuth</u>	<u>Relative Field</u>	<u>ERP(kW)</u>	<u>ERP(dBk)</u>
30 deg.	0.577	14.4824	11.6084
40 deg.	0.457	9.0849	9.5832

Rate of Attenuation 2.0252

<u>Azimuth</u>	<u>Relative Field</u>	<u>ERP(kW)</u>	<u>ERP(dBk)</u>
50 deg.	0.365	5.7953	7.6308
60 deg.	0.288	3.6081	5.5728

Rate of Attenuation 2.0580

<u>Azimuth</u>	<u>Relative Field</u>	<u>ERP(kW)</u>	<u>ERP(dBk)</u>
110 deg.	0.467	9.4869	9.7712
120 deg.	0.589	15.0911	11.7872

STATEMENT OF HERMAN E. HURST, JR.
 REPLY TO OPPOSITION TO
 PETITION TO DISMISS OR DENY
 PAGE 9

	Rate of Attenuation	2.0160	
<u>Azimuth</u>	<u>Relative Field</u>	<u>ERP(kW)</u>	<u>ERP(dBk)</u>
120 deg.	0.589	15.0911	11.7872
130 deg.	0.743	24.0141	13.8046
	Rate of Attenuation	2.0175	

In addition, Section 73.316(c)(5) of the FCC rules requires a statement that the antenna will be mounted, "in accordance with specific instructions provided by the antenna manufacturer." No such statement is included in the ACGI application.

Further, Section 73.316(c)(7) of the FCC Rules requires a statement that, "no other antennas are mounted on the same tower level as a directional antenna, and that no antenna of any type is mounted within any horizontal or vertical distance specified by the antenna manufacturer as being necessary for the proper directional operation." No such statement is included in the ACGI application.

In its Opposition, ACGI claims that "proper directional operation is implicit in the filing of the application itself." Further, ACGI claims that "it is not policy of the Bureau to require an explicit statement at the application stage." To the contrary, FCC Form 301, entitled "Application for Construction Permit for Commercial Broadcast Station," specifically requests the applicant to provide all data specified in 47 C.F.R. Section

STATEMENT OF HERMAN E. HURST, JR.
REPLY TO OPPOSITION TO
PETITION TO DISMISS OR DENY
PAGE 10

73.316. If the Construction Permit applicant is proposing a directional transmit antenna, the applicant must "attach as an Exhibit a statement with all data specified in ... Section 73.316." See FCC Form 301, Section V-B, Item 10. In response to this item, ACGI answered "See Eng." As stated earlier, nothing in ACGI's engineering exhibit verified compliance with Sections 73.316(c)(5) and/or (c)(7) of the Commission's Rules.

VIOLATION OF SECTION 73.215

On August 30, 1991, ACGI amended its application by modifying the directional antenna pattern with the intent to "eliminate any potential conflict between the Allegheny application and the proposal pending in MM Docket No. 87-433 to allocate Channel 228A to Barnesboro, Pennsylvania". Neither the original application nor the August, 1991, amendment affords Barnesboro the proper protection.

Channel 228A in Barnesboro, Pennsylvania, would be a first-adjacent channel to the ACGI proposal (Channel 229B). The reference coordinates of the Barnesboro allotment are 2.7 kilometers short-spaced to ACGI's proposed transmitter site under

STATEMENT OF HERMAN E. HURST, JR.
REPLY TO OPPOSITION TO
PETITION TO DISMISS OR DENY
PAGE 11

Section 73.213(c)(1).⁴ As a result of this short-spacing, ACGI attempted to protect Barnesboro pursuant to Section 73.215.

Section 73.215(b)(2)(i) sets forth the procedure to protect vacant allotments such as Channel 228A in Barnesboro, Pennsylvania. The rule states "for vacant allotment contours are based on the presumed use, at the allotments reference point, of the maximum ERP that could be authorized for the station class of the allotment...[and] the reference HAAT for the station class of the allotment."

Section 73.211(b)(1) lists the maximum Class A ERP as 6.0 kilowatts. In its amended application, ACGI incorrectly assumed an ERP of only 3.0 kilowatts for the Class A Barnesboro allotment when computing the pertinent contours under 73.215(a). See ACGI's Engineering Statement Covering Amendment to Application for Construction Permit, Table IV, Page 3.

When the Barnesboro allotment is properly considered under the provisions of Section 73.215(b)(2)(i), the ACGI proposal would receive prohibited overlap in

⁴The spacing requirements of Section 73.213(c)(1) govern the ACGI proposal with respect to Barnesboro because the Barnesboro reference coordinates and the Channel 229B allocation in Pittsburgh became short-spaced as a result of the Commission's October 2, 1989, revision of Section 73.207. See MM Docket 88-375, Second Report and Order, Adopted July 13, 1989, Released August 18, 1989.

STATEMENT OF HERMAN E. HURST, JR.
REPLY TO OPPOSITION TO
PETITION TO DISMISS OR DENY
PAGE 12

contravention of Section 73.215(a). Attached as Exhibit 3 is a detailed plot of the prohibited overlap.

Accordingly, the ACGI's amended proposal fails to properly protect Channel 228A at Barnesboro, Pennsylvania, under Section 73.215 of the Commission's Rules. In addition, ACGI's original proposal afforded no protection whatsoever to Channel 228A, Barnesboro, Pennsylvania.

MISREPRESENTATION OF SUPPORT STRUCTURE

ACGI's proposed support structure is an existing pole atop a building. See photographs submitted as Exhibit 1 with EZ's Petition to Dismiss or Deny the ACGI Application. The pole currently supports a number of two-way communications antennas along the entire length of the pole.

EZ, in the Petition to Deny or Dismiss the ACGI application, questioned ACGI's representation of the proposed support pole and the physical capability of the proposed pole to accommodate the load and vertical aperture associated with the proposed FM antenna. In response, ACGI claimed that a "detailed Checklist for Foreign Attachments was prepared by [ACGI's consulting engineer] which included manufacturer's specification data sheets detailing weight, windloading, and dimensions of the proposed antenna system". See ACGI's Opposition, Engineering Statement, Page 6. ACGI did not

STATEMENT OF HERMAN E. HURST, JR.
REPLY TO OPPOSITION TO
PETITION TO DISMISS OR DENY
PAGE 13

include the checklist in its Opposition, and has provided no information regarding which antennas presently on the structure will be relocated or removed (if any) to provide space for the proposed FM directional transmitting antenna. Therefore, one cannot include that ACGI's proposed antenna installation is technically feasible.

ENVIRONMENTAL STATEMENT/RADIOFREQUENCY RADIATION ANALYSIS

In both its original application and its amended application, ACGI has claimed compliance with the American National Standards Institute (ANSI) guidelines for human exposure to RF radiation at ground level for the proposed facility; yet the proposed facility would significantly exceed the ANSI guideline value on roof level in both instances.

As prescribed in O.S.T. Bulletin 65, on Page 7, "where a number of different frequencies are involved, the contributions of all RF sources must be considered...and the sum of all fractional contributions should not exceed 1.0." ACGI failed to consider the affect of both the co-located antennas on its proposed support pole and nearby FM and television facilities on its predicted power density. Television station WPGH, Pittsburgh, Pennsylvania, and FM broadcast stations WMXP(FM), New Kensington, Pennsylvania, and WORD-FM, Pittsburgh, Pennsylvania, are located only 614 feet from ACGI's proposed site.

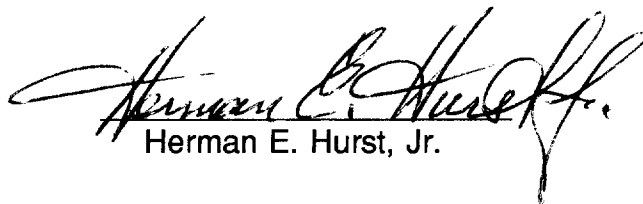
STATEMENT OF HERMAN E. HURST, JR.
REPLY TO OPPOSITION TO
PETITION TO DISMISS OR DENY
PAGE 14

In its amended application, which ACGI claims "addressed the issue" of occupational safety, ACGI insufficiently addressed the potential occupational hazard, claiming only that the "the applicant will establish a policies and procedures plan at the site concerning worker exposure." See Engineering Statement Covering Amendment to Application for Construction Permit for ACGI, Page 5. Further, ACGI failed to address potential radiation hazard within the building on which the antenna would be mounted.

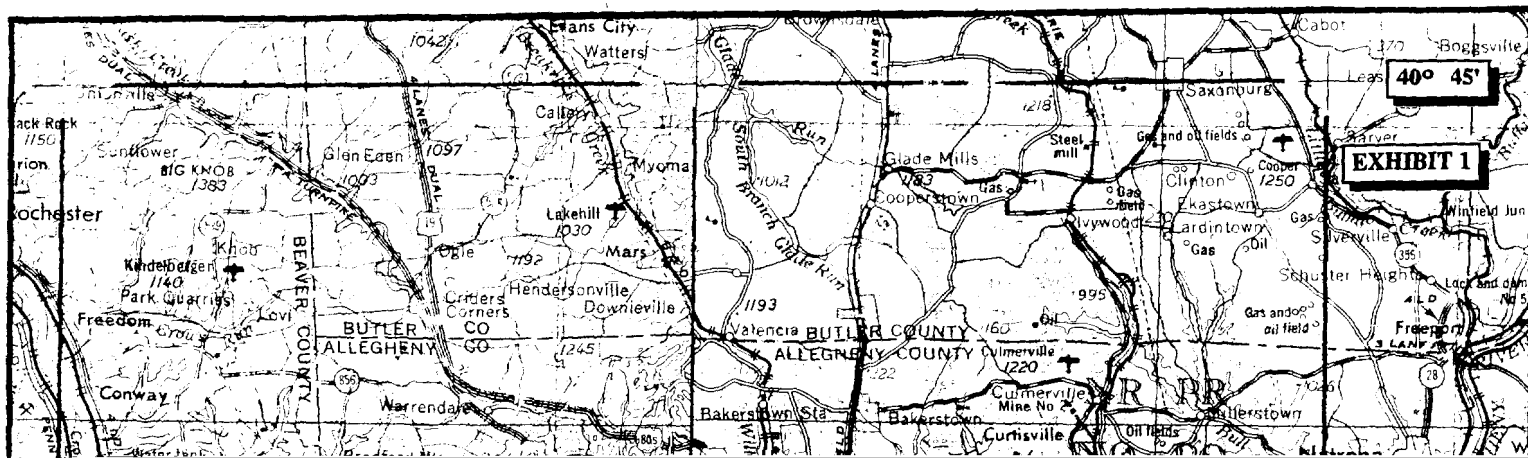
In light of the above, ACGI's repeated claims of compliance with both public exposure limits and occupational safety are not verifiable. Clearly, the environmental statement is not compliant with the Commission's Rules and Regulations.

This statement was prepared by me or under my direct supervision, and is believed to be true and correct.

DATED: January 16, 1992



Herman E. Hurst, Jr.



TABULATION OF DIRECTIONAL ANTENNA RADIATION PATTERN
(IN RELATIVE FIELD)
REQUIRED TO PROTECT
CHANNEL 228A, BARNESBORO, PENNSYLVANIA
AND WQIO(FM), MT. VERNON, OHIO
PURSUANT TO SECTION 73.215

HYPOTHETICAL TRANSMITTER SITE:

40° 29' 49" N.L.
79° 56' 26" W.L.

ASSUMED ANTENNA HEIGHT ABOVE AVERAGE TERRAIN = 100 METERS

THE FOLLOWING RELATIVE FIELDS ARE BASED UPON A MAXIMUM EFFECTIVE
RADIATED POWER OF 30.0 KILOWATTS:

<u>AZIMUTH</u>	<u>RELATIVE FIELD</u>	<u>AZIMUTH</u>	<u>RELATIVE FIELD</u>
0°	0.516	190°	0.959
10°	0.435	200°	0.770
20°	0.365	210°	0.619
30°	0.341	220°	0.497
40°	0.276	230°	0.399
50°	0.223	240°	0.318
60°	0.182	250°	0.258
70°	0.182	260°	0.288
80°	0.223	270°	0.288
90°	0.276	280°	0.355
100°	0.341	290°	0.439
110°	0.385	300°	0.547
120°	0.421	310°	0.683
130°	0.500	320°	0.851
140°	0.595	330°	1.000
150°	0.707	340°	0.803
160°	0.840	350°	0.645
170°	0.969		
180°	1.000		

**DETAILED INTERFERENCE STUDY
PURSUANT TO SECTION 73.215
OF THE FCC RULES**

**ALLEGHENY COMMUNICATIONS GROUP : CHANNEL 229 B
43.5 kW ERP (DA-MAX) — 158 M HAAT
BARNESBORO, PENNSYLVANIA DOCKET 87-433 : CHANNEL 228 A**

NOTE:

**ALLEGHENY COMMUNICATIONS GROUP CONTOUR DISTANCE
BASED ON DIRECTIONAL ANTENNA SPECIFIED IN 8-30-91 AMENDMENT
TO APPLICATION BPH-910628MC AND TERRAIN DATA CALCULATED
AT FIVE DEGREE INTERVALS (TERRAIN SOURCE : TGP-0050)**

CERTIFICATE OF SERVICE

I, Judy Cooper, a legal secretary in the law offices of Koteen & Naftalin, hereby certify that true copies of the foregoing "Reply to Opposition to Petition To Dismiss Or Deny" have been served upon the following by first-class United States mail this 17th day of January, 1992:

*/ Irene J. Bleiweiss, Esquire
Federal Communications Commission
Room 302
1919 M Street, N.W.
Washington, D.C. 20554

Lewis I. Cohen, Esquire
Morton L. Berfield, Esquire
Cohen & Berfield
1129 - 20th Street, N.W.
Washington, D.C. 20036


Judy Cooper

*/ By hand delivery